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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

JILL BRUNELLE, an Oregon resident,
on behalf of herself and all similarly
situated persons,

Plaintiff,
v.

MY PILLOW, INC., a Minnesota
Corporation,

Defendant.

Case No. 3:16-cv-2007

**CLASS ACTION
ALLEGATION COMPLAINT**

- (1) Fraud**
- (2) State Unlawful Trade Practices**
- (3) Injunctive Relief Only**

JURY TRIAL DEMANDED

Plaintiff individually and on behalf of the Classes described below, through
counsel alleges as follows:

NATURE OF THE CASE

1. This is a proposed class action. Plaintiff, on behalf of herself and all similarly situated persons seek injunctive relief based on Defendant's acts and omissions. This includes such relief for a national class based on fraud and state subclasses based on violations of individual state consumer protection acts and other state laws.

2. These claims relate to an advertising campaign by My Pillow, Inc. It offers a pillow for sale, and claims to include a "free" pillow as part of the purchase. This is commonly known as a "Buy One Get One Free" or "BOGO" Promotion. My Pillow, Inc.'s BOGO Promotions are made in television advertisements seen in all fifty states, as well as on the MyPillow.com website and the internet website YouTube and others, all of which were and are accessible in fifty states, including Oregon.

3. The My Pillow, Inc. BOGO Promotions are false and deceptive because My Pillow, Inc. is not providing one pillow for "free." Instead, it is inflating the regular price of the pillow being purchased as part of the promotion, resulting in the buyer purchasing two pillows at or near the combined regular prices for two pillows. In other words, the pillow that is being sold as part of the BOGO Promotion can be purchased for a substantially lower price without inclusion of the "free" pillow. Stated another way, defendant is attempting to mislead purchasers into purchasing two pillows instead of one under the guise that one of the two pillows is free, when actually it is not.

4. Concurrent with the filing of this Complaint for injunctive relief related to conduct within the state of Oregon, plaintiff has provided the required notice to Defendant pursuant to ORCP 32 H. If, after the statutory notice period has expired Defendant has not complied with the requirements of ORCP 32H, Plaintiff / Class Representative Brunelle intends to amend this action after 30 days to add a request for money damages as necessary.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1367(a) and §1332, because: (a) plaintiff is a resident of Oregon, and Defendant is a Minnesota corporation with its principal place of business in Minnesota, and (b) the damage claims exceed \$75,000 in the aggregate.

6. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. §1332(d)(2), the “Class Action Fairness Act.” On information and belief, there are thousands of class members in each of the proposed classes, the amount in controversy exceeds \$5,000,000, and Plaintiff and substantially all members of the Class are citizens or residents of different states than Defendant.

7. This Court has personal jurisdiction over Defendant because it does business in the state of Oregon and this District and a substantial portion of the wrongdoing alleged in this complaint took place here. Defendant has intentionally availed itself to markets and customers in the state of Oregon and this District through the presence of marketing and promotion through locally televised

advertisements, and sales of products into Oregon and this District. Defendant has contacts with Oregon and District sufficient to render the exercise of jurisdiction by this Court permissible under traditional notions fair play and substantial justice.

8. Venue is proper within the state of Oregon and this District pursuant to 29 U.S.C. §1391.

THE PARTIES

9. Plaintiff / Class Representative Jill Brunelle (“Brunelle”) is an individual who resided in the state of Oregon and participated in the BOGO Promotion within Oregon during the applicable class period.

10. Defendant My Pillow, Inc. (“MyPillow”) is a Minnesota limited liability company with its principal place of business in Minnesota.

11. MyPillow’s 70,000 square foot manufacturing plant is located in Shakopee, Minnesota, where it produces approximately 25,000 pillows per day.

DEFENDANT’S CONDUCT

12. At various times during the class period, MyPillow, through its televised advertisements, web pages, and other media (collectively, “advertisements”), offered a “Buy One Get One Free” offer related to its pillows.

13. MyPillow began its Buy One Get One Free advertisement campaign in 2014 based in substantial part on extended televised advertisements (“infomercials”). MyPillow’s infomercials encouraged viewers to call in to a toll free number to place an

order with an operator, or visit Defendant's website, www.mypillow.com to order its pillows.

14. MyPillow's infomercials were running a combined average of approximately 175 to 200 times per day on local and national networks, radio, and television channels.

15. The MyPillow Buy One Get One Free offer was heavily advertised on various television stations, including Fox News. In order to receive a "free" pillow under the Buy One Get One Free offer, the advertisements provided a promotion code. Various alphanumeric promotion codes applied, such as "MY105" and "MY16". The promotion codes are readily and freely available on the MyPillow website, in its commercials, and at various other third party websites on the internet.

16. The pillows could be purchased under the Buy One Get One Free offer either by calling into the number provided in the advertisements and ordering through an operator, or purchased online through the www.MyPillow.com website.

17. The advertisements stated "call or go online now to order MyPillow and Mike will give you a second pillow absolutely free. Use the promo code on your screen to get two MyPillows for the price of one."

18. To take advantage of the Buy One Get One Free offer, class members, including Plaintiff, listened to the advertisements, and either ordered online, or called in and ordered through an operator.

19. The advertising campaign and related Buy One Get One Free offer discussed in paragraphs 12 through 18, above will be referred to as the “BOGO Promotion” throughout the remainder of this Complaint.

20. Unbeknownst to Plaintiff and class members, they were not getting two pillows “for the price of one.” Instead, MyPillow was inflating the regular price of the first pillow to approximately or exactly twice its regular price, thereby passing on the cost of the “free” pillow to the consumer.

21. For example, those obtaining two queen size pillows as part of the BOGO Promotion paid \$99.97. One Standard / Queen Premium pillow from MyPillow, however, could be purchased from the MyPillow website for a regular price of \$49.99, and from MyPillow on Amazon.com for \$59.95. When two Standard / Queen Premium pillows were obtained as part of the BOGO Promotion, the “free” pillow was not actually free.

22. MyPillow’s advertisements regarding the BOGO Promotion have been consistent throughout the class period.

23. Below are screenshots of MyPillow television advertisements related to the BOGO Promotion during the class period:





INDIVIDUAL ALLEGATIONS

24. Plaintiff / Oregon Sub-Class Representative Brunelle is an Oregon resident. Within the class period, Brunelle saw the MyPillow advertisement on a television station, listened, understood, and relied on the representation that if she purchased one premium pillow from MyPillow, she would get another premium pillow from MyPillow for “free.”

25. Based on this information, she later called MyPillow. During the call, she spoke with an operator, and paid a total of \$119.95 (including shipping and handling of \$9.98) to purchase one King Premium pillow (Item# K 2034-G) and to get one King Premium pillow for “free.” Her order, numbered 328455310, was placed on July 6, 2016 and shipped on July 7, 2016.

26. Based on Defendant's representations made as part of the advertisement, she believed the true and regular price of the one pillow was \$109.97 (\$119.95 minus shipping and handling) and that the second pillow was being given to her free of charge. Instead, one King Premium pillow could be obtained at the MyPillow website for a regular price of \$54.99, and from MyPillow at Amazon.com for \$69.95. Thus, the "free" pillow was not actually free. The transaction was instead a disguised purchase of two pillows. Brunelle only wanted one pillow, and had she known that she could have purchased one for \$54.99 plus shipping or \$69.95 with free shipping, she would have done so.

PUBLIC'S EXPERIENCE WITH DEFENDANT'S BOGO PROMOTION

27. Consumers have expressed their dismay with the fraudulent nature of the MyPillow BOGO Promotion. The common thread of complaints are based on MyPillow's false insistence that the "regular" price of its Premium MyPillow is \$99.97 (queen) or \$109.97 (king), when in reality, the regular price at which almost all Premium MyPillows can be purchased and are sold on the website and elsewhere is approximately half that amount.

28. Examples, and MyPillow's responses taken from internet commentary include the following:

- a. Richard B: "No pillow is worth 100.00 dollars. So this crap you buy one and get on free your [sic] paying for the free one."

MyPillow: "Hello Richard, Without a promo code, the pillows are \$99.97 each. Two pillows would be \$199.94 without a promo code. If you have a promo code we will either take off the cost of one pillow on the BOGO of [sic] if you want or need a single pillow, we will drop the cost from \$99.97 to \$49.98, 50% off. In order to get these prices you must have a valid promo code. It is the same anywhere with a buy one get one deal. You have to buy the first object at full price to get the second free."

- b. Mark D: "Buy one get one free. But if you just want to buy one, it's 50 bucks! But if you want one free, it's a hundred bucks. This guy is a scammer stay away guys."

MyPillow: "Hello Mark. Without a promo code, the pillows are \$99.97 each. Two pillows would be \$199.94 without the promo code. If you have a promo code we will either take off the cost of one pillow on the BOGO of [sic] if you only want or need a single pillow we will drop the cost from \$99.97 to \$49.98, 50% off. In order to get these prices you must have a promo code."

Mark D: "Promo code!" Come on! Who charges a hundred bucks for a pillow? They're fifty bucks a piece. It's simple logic. You buy one at 50 bucks, you get the next one free. Promo code! What does that mean? It's a scam. *** If I can buy one at

50 bucks, the next one should be free. Promo code, or no promo code. “PROMO CODE=SCAM!!!”

- c. Donnie E: “I can purchase this pillow for 49.95 without entering a “special promo just for KLOS listeners” I feel bad for those that paid full price on the internet.”
- d. Glenda J: “If it retails for 59.00 then that’s what it should be when he offers the buy one get one free! They raised the price so it’s not really a deal but misleading!”
- e. Michael O: “The new promotion is a scam! One at K Mart / Wally World is \$49.97. Buy One, Get One with promo code is 99.94. How are you getting one free? This is a shameful attempt to trick customers. You should be ashamed,,,
Ashamed indeed, pillow man!”

MyPillow: “*** The Buy one get one free deal is only through our website. When we sell our pillows on Amazon/eBay/Walmart they are already marked down to 50% off the original price. We do this because those retailers do not accept promo codes like the ones you see on TV or Radio. With the buy one get on free deal you would purchase the first pillow at retail value (99.95 – 109.95) and get the second one free. If you purchase 2 pillows

on amazon/eBay that would come out to be the same prices as the deal on our website.”

f. “How can they get away with advertising one pillow for \$49 and offering a buy one get one free offer for \$99? This “promo” is all over the tv and their website. Where is consumer protection on this. *** Two for one means two pillows for \$49, not \$99.”

Chapel Hill, NC.

g. “Very disappointed and don’t believe “get one free”. Its is a lie and you are charged for two.” Laguna Woods, CA.

CLASS ALLEGATIONS

29. Plaintiff brings this action for herself, and on behalf of all similarly situated persons who participated in the BOGO Promotion nationwide and in Oregon, and any other such Class States as the Court may determine appropriate for class certification treatment pursuant to Federal Rules of Civil Procedure 23(a) and 23(b).

30. The Class and Subclasses of persons that Plaintiff seeks to represent are initially defined as:

- (a) The “Nationwide Class” defined as:
all persons who, at any time during the applicable class period purchased a pillow from Defendant as part of its “Buy One Get One Free” Promotion.
- (b) The “Oregon State Subclass” defined as:

all persons who, at any time during the applicable Subclass period, were Oregon residents and purchased a pillow from Defendant as part of its "Buy One Get One Free" Promotion.

31. Excluded from the Nationwide Class and the Oregon State Subclass is:

- (a) any Defendant, person, firm, trust, corporation, officer, director, or other individual or entity in which any Defendant has a controlling interest or which is related to or affiliated with any Defendant, and any current employee of any Defendant; (b) all persons who make a timely election to be excluded from the proposed Class; (c) the judge(s) whom this case is assigned and any immediate family members thereof; and (d) the legal representatives, heirs, successors-in-interest or assigns of any excluded party.

32. Plaintiff's fraud claim is appropriate for class-wide certification and treatment because each class representative can prove the elements of their claim on a class-wide basis using the same evidence that would be used to prove those elements in individual actions alleging the same claims.

33. The claims by Brunelle as class representative for the Oregon State Subclass are appropriate for sub-class certification and treatment because she can prove the elements of her claim on a sub-class-wide basis using the same evidence that would be used to prove those elements in individual actions alleging the same Oregon State Subclass claims.

34. Numerosity Under Rule 23(a)(1). Members of the National Class and Oregon State Subclass are so numerous that joinder of all members individually into one action, or into an individual state-wide action, or otherwise is impractical. On information and belief, the National Class consists of substantially more than 1,000,000 members, and the Oregon State Subclass likely exceeds 10,000 members.

35. Commonality and Predominance under Rule 23(a)(2) and (b)(3). Common questions of law and fact are shared by Plaintiff and members of the National Class and the Oregon State Subclass which predominate over any individual issues.

36. For the National Class, common issues of law include:

- a. Did Defendant make a material misrepresentation regarding the nature of the transaction?
- b. Did Defendant make a material misrepresentation regarding the actual price of its MyPillow pillow?
- c. Did Defendant make a material misrepresentation regarding whether the purchaser was receiving a free MyPillow pillow?

37. For the Oregon State Subclass common questions of law and fact include each of the above common questions of law and fact applicable to the National Class, and in addition:

- a. Did Defendant violate ORS §646.608(j) because its conduct constituted a false or misleading representation of fact concerning the reasons for, existence of, or amount of price reduction;

- b. Did Defendant violate ORS §646.608(p) because its conduct constituted a false or misleading statement about a promotion used to publicize a product;
- c. Did Defendant violate ORS §646.608(s) because its conduct constituted a false or misleading representation of fact concerning the offering price of, or the person's cost for goods;
- d. Did Defendant violate ORS §646.608(u) because its conduct was declared to be unfair or deceptive in trade or commerce by administrative rules established by the Oregon Attorney General in accordance with the provisions of ORS chapter 183?
- e. Was Defendant's conduct proscribed by OAR 137-020-0015(2)(a)(B) which states: "A person engages in conduct which is unfair or deceptive in trade or commerce *** when the person makes a free offer in conjunction with the purchase *** of goods *** When the item to be purchased *** can be purchased for a lesser price without the "free" item?
- f. Was Defendant's conduct proscribed by OAR 137-020-0015(2)(a)(C) which states: "A person engages in conduct which is unfair or deceptive in trade or commerce *** when the person makes a free offer in conjunction with the purchase *** of goods *** At a price that is higher than the "regular price"?

- g. Was Defendant's conduct proscribed by OAR 137-020-0015(2)(a)(D) which states: "A person engages in conduct which is unfair or deceptive in trade or commerce *** when the person makes a free offer in conjunction with the purchase *** of goods *** That is deceptive or misleading?"
- h. Did Defendant violate ORS §646.608(sss) because its conduct was proscribed by ORS §646.644 relating to Free Offers?
 - i. Should the court grant equitable relief under ORS §646.638(8)(c)?;
 - j. What types of equitable relief are appropriate?
 - k. Was notice to Defendant required under ORCP 32H, and if so, was proper notice provided by the representative of the Oregon Subclass?

After the ORCP 32H notice period and if non-compliance by Defendant:

- l. Were Defendant's violations of ORS 646.608 reckless or through knowing use or employment of a method, act, or practice declared unlawful by ORS §646.608?
- m. Are Brunelle and Oregon State Subclass members entitled to an award of actual damages or statutory damages of \$200 for each violation under ORS §646.638(8)(a)?
- n. If actual damages are appropriate, what is the amount of actual damages per violation?

o. Are punitive damages appropriate against Defendant pursuant to
ORS §646.638(8)(b)?

p. If punitive damages are appropriate, what is the proper amount?

38. Each of the Plaintiff's / Class Representative's claims are typical of the claims of the members of the National Class. Each National Class claim arises from the same type events, practices, and course of conduct by Defendant -- the MyPillow BOGO Promotion. The legal theories asserted by Plaintiff / Class Representative are the same as the legal theories that will be asserted on behalf of the National Class -- money damage claims for fraud.

39. Brunelle's claims as Oregon State Subclass Representative for the Oregon State Subclass are typical of the claims of the members of the Oregon State Subclass. The claims arise from the same type events, practices, and course of conduct by Defendant -- the BOGO Promotion.

40. Plaintiff is willing and prepared to serve the Court and proposed Oregon State Subclass to which she belongs in a representative capacity with all of the required material obligations and duties. Plaintiff will fairly and adequately protect the interests of the National Class and the Oregon State Subclass to which she belongs, and has no interests adverse to or which directly or irrevocably conflict with the other members of the National Class or the Oregon State Subclass.

41. The self-interests of Plaintiff Brunelle are co-extensive with, and not antagonistic to those of the absent members of the National Class and the members of the Oregon State Subclass to which she belongs. Brunelle will represent and

protect the interests of the absent National Class and the Oregon State Subclass to which she belongs.

42. Plaintiff has engaged the services of the following counsel and law firms: Rick Klingbeil, PC; Brady Mertz, PC, Robert Curtis and Foley Bezek Behle & Curtis, LLP. Counsel are experienced in litigation, complex litigation, and class action cases, and will protect the rights of and otherwise effectively represent the named class representatives and absent National Class and Oregon State Subclass members.

43. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy because joinder of all parties is impracticable. The operative facts relating to Plaintiff and members of the National Class and Oregon State Subclass are the same, the damages suffered by individual Class and Oregon State Subclass members are relatively small, the expense and burden of individual litigation makes it inefficient and ineffective for members of the Class and Oregon State Subclass to individually redress the wrongs done to them, and proceeding as a class action will resolve thousands of claims in a manner that is fair to Defendant and Class Members. There will be no difficulty in the management of this case as a class action with a National class consisting of members from 50 states, and one State Subclass consisting of the same individuals from the same state.

44. Class members may be notified of the pendency of this action by several means, including notice on promotional websites and social media related to the BOGO Promotion, directly based on charge and banking card records used in the transactions, and if deemed necessary or appropriate by the Court, through published notice.

45. Further, upon information and belief, MyPillow recorded details about the individual purchasers, which provides a direct method of notifying a substantial percentage of National Class and State Subclass members.

46. The prosecution of separate actions by individual National Class and State Subclass members would create a risk of inconsistent or varying adjudications with respect to individual members, which would establish incompatible standards of conduct for Defendant. Defendant has acted on grounds that apply generally to the National Class and any State Subclass making equitable relief appropriate to the Class as a whole.

NATIONAL CLASS

CLAIM FOR RELIEF

(Intentional Fraud / Deceit)

47. On behalf of herself and the members of the National Class, Plaintiff / Class Representative Brunelle realleges paragraphs 1 through 46, and further alleges:

48. Defendant represented to Plaintiff and to each class member that there was a BOGO Promotion by which Plaintiff and each class member would obtain a free pillow from MyPillow if they purchased one pillow from MyPillow at the regular price. As part of this BOGO Promotion, Defendant misrepresented the regular price of one pillow. For example, in the case of Ms. Brunelle, MyPillow represented that the price of one King Premium pillow (as part of the BOGO Promotion), was at or approximately \$109.98. However, one such pillow could have been purchased off of the MyPillow website, www.mypillow.com for \$54.99, or from MyPillow through www.Amazon.com for \$69.95 with free shipping.

49. Defendant's misrepresentation was material because it inflated the price of the pillow that it was selling as part of the BOGO Promotion in order to pass along the cost of the "free" pillow to the consumer.

50. MyPillow knew that its representations concerning the price of the pillow as part of the BOGO Promotion was false, given that it sold the one pillow for far less on both its www.mypillow.com website and on Amazon.com.

51. MyPillow intended that its misrepresentation be acted on by Plaintiff and by the rest of the class members.

52. Plaintiff as well as other class members was not aware of the true price of the pillow and reasonably relied on the truth of MyPillow's representations.

53. As a direct and proximate result of Plaintiff's and class members' reliance on MyPillow's material misrepresentations, Plaintiff and class members suffered an ascertainable loss of money.

54. Plaintiff and Nationwide Class are entitled to injunctive relief as necessary to cause Defendant to stop all fraudulent conduct associated with its BOGO Promotion.

OREGON SUBCLASS

CLAIMS FOR RELIEF

(ORS §646.608 - Unlawful Trade Practices)

55. On behalf of himself and the Oregon Subclass, Brunelle realleges paragraphs 1 through 54, and further alleges:

56. Defendant violated:

- a. ORS §646.608(j) because its conduct constituted a false or misleading representation of fact concerning the reasons for, existence of, or amount of price reduction;
- b. ORS §646.608(p) because it constituted a false or misleading statement about a promotion used to publicize a product;
- c. ORS §646.608(s) because it constituted a false or misleading representation of fact concerning the offering price of, or the person's cost for goods;
- d. ORS §646.608(u) because its conduct was declared to be unfair or deceptive in trade or commerce by administrative rules

established by the Oregon Attorney General in accordance with the provisions of ORS chapter 183. Specifically, Defendant's conduct was proscribed by OAR 137-020-0015(2)(a)(B),(C), and (D), Unfair or Deceptive Use of "Free" Offers, which state:

"A person engages in conduct which is unfair or deceptive in trade or commerce *** when the person makes a free offer in conjunction with the purchase *** of goods:

(B) When the item to be purchased *** can be purchased for a lesser price without the "free" item; [or]
(C) At a price that is higher than the "regular price"; [or]
(D) That is deceptive or misleading.;

e. ORS §646.608(sss) because its conduct was proscribed by ORS §646.644 relating to Free Offers.

57. Brunelle and Oregon Subclass Members are entitled to injunctive relief pursuant to ORS §646.638(8)(c).

REQUEST FOR RELIEF

Case Management

58. On behalf of herself, the National Class, and Oregon State Subclass members Plaintiff / Class Representative Brunelle seeks an Order from this Court:

- a. Certifying this action as a class action as set forth above, or as a class action or issue class as otherwise deemed appropriate by the Court pursuant to a Motion to Certify Class Action to be filed by Plaintiff in this case;
- b. Appointing Plaintiff Brunelle as National Class Representative, and appointing her as representative for the Oregon State Subclass.
- c. Approving counsel listed herein as class counsel for the National Class, the Oregon State Subclass, and any future State Subclasses.
- d. Setting a trial by jury for all issues so triable.

Damages

National Class

- A. Injunctive relief as necessary to cause Defendant to stop all fraudulent conduct associated with its BOGO Promotion.

Oregon Subclass

- B. Injunctive relief as necessary to prevent future violations of ORS §646.608,

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ORS §646.644, and OAR 137-020-0015.

Dated: October 18, 2016.

Rick Klingbeil, PC

/s/ Rick Klingbeil

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